

AMENDMENT NUMBER 1
CONTRACT NO. DIR-TSO-2735
BETWEEN
THE STATE OF TEXAS, DEPARTMENT OF INFORMATION RESOURCES
AND
HP ENTERPRISE SERVICES, LLC

This Amendment Number 1 to Contract Number DIR-TSO-2735 ("Contract") is between the Department of Information Resources ("DIR") and HP Enterprise Services, LLC ("Vendor"). DIR and Vendor agree to modify the terms and conditions of the Contract as follows:

1. **Contract, Section 2. Term of Contract**, is hereby amended as follows:

The term of this Contract is extended for one (1) year through December 18, 2016. If vendor has no sales for the one-year term, DIR will not extend or negotiate any extensions. The Contract will expire December 19, 2016. Prior to the expiration date of the term, DIR and Vendor may extend the Contract upon mutual agreement, for up to the remaining two (2) additional one-year terms.

2. **Contract, Section 4. Pricing**, is hereby removed from the Contract and transitioned in its entirety to Appendix A, Standard Terms and Conditions for Services Contracts, **Section 7. Pricing, Purchase Orders, Invoices, and Payments**.

3. **Contract, Sections 5 - 9** are hereby re-numbered **Sections 4 – 7**.

- A. **Section 5. DIR Administrative Fee** is re-numbered as **Section 4. Administrative Fee**;
 - B. **Section 6. Notification** is re-numbered as **Section 5. Notification**;
 - C. **Section 7. Statement of Work, Service Agreement and Shrink/Click-wrap Agreements** is re-numbered as **Section 6. Statement of Work, Service Agreement and Shrink/Click-wrap Agreements**;
 - D. **Section 9. Authorized Exceptions to Appendix A, Standard Terms and Conditions for Services Contracts** is re-numbered **Section 7. Authorized Exceptions to Appendix A, Standard Terms and Conditions for Services Contracts**.

4. **Contract, Section 5. Notification**, is hereby replaced with the following:

If sent to the State:
Shannon Kelley
Manager, Enterprise Contract Management
Department of Information Resources
300 W. 15th St., Suite 1300
Austin, Texas 78701

Phone: (512) 475-4700
Facsimile: (512) 475-4759

If sent to the Vendor:

Melinda Maczko
Client Executive
HP Enterprise Services State and Local
5400 Legacy; MS: H1-3F-61
Plano, TX 75024
Office: 972 605 6337
Mobile: 972 814 2630 (preferred)
Fax: 972-996-1160
Email: melinda.maczko@hpe.com

5. **Appendix A, Section 4, Intellectual Property Matters**, is hereby restated:

Notwithstanding anything to the contrary in this section, Customer will retain exclusive ownership of its data and information as described in this Contract and its Exhibits.

A. Definitions

1. "Work Product" and "Deliverables" means any and all deliverables produced by Vendor for Customer under a Statement of Work issued pursuant to this Contract, including any and all tangible or intangible items or things that have been or will be prepared, created, developed, invented or conceived at any time following the effective date of the Contract.
2. "Intellectual Property Rights" means the worldwide legal rights or interests evidenced by or embodied in: (i) any idea, design, concept, personality right, method, process, technique, apparatus, invention, discovery, or improvement, including any patents, trade secrets, and know-how; (ii) any work of authorship, including any copyrights, moral rights or neighboring rights; (iii) any trademark, service mark, trade dress, trade name, or other indicia of source or origin; (iv) domain name registrations; and (v) any other proprietary or similar rights. The Intellectual Property Rights of a party include all worldwide legal rights or interests that the party may have acquired by assignment or license with the right to grant sublicenses.
3. "Statement of Work" means a document signed by Customer and Vendor describing a specific set of activities and/or deliverables.
4. "Third Party IP" means the Intellectual Property Rights of any third party not a party to this Contract, and which is not directly or indirectly providing any goods or services to Customer under this Contract.

B. Ownership.

State License.

- (a) The Deliverable(s) and all Intellectual Property Rights associated with those Deliverable(s) will be owned by the Vendor at creation and will not be considered works made for hire. The Vendor grants to the Customer a non-exclusive, royalty-

free, site-wide, irrevocable license to use, copy, and distribute the Deliverable(s) and related documentation according to the terms and conditions of this Contract and Supporting Materials. For the purposes of this license, "site-wide" includes any State of Texas office regardless of its physical location.

- (b) The State may modify the Deliverable(s) and may combine such with other programs or materials to form a derivative work. The State will own and hold all copyright, trademark, patent and other intellectual property rights in any derivative work, excluding any rights or interest in the Deliverable(s) other than those granted in this Contract.
- (c) The State may copy the Deliverable(s) to multiple hard drives or networks.
- (d) The State may copy the Deliverable(s) in the course of routine backups for the purpose of recovery.
- (e) In the event that the Vendor ceases to conduct business, or ceases to support the Deliverable(s), the State's license will not cease. The license may be terminated if used in a manner that would violate the terms of this Contract and Supporting Material.
- (f) Notwithstanding the license grants, any Third Party IP incorporated into any licensed Deliverable(s) will be subject to the license terms applicable to such Third Party IP.
- (g) The State and the Vendor will continue to own their respective Intellectual Property Rights developed before entering into the Contract or developed outside the scope of this Contract, and all modifications or derivative works thereof. Any software licensed through the Vendor and sold to the State will be licensed directly to the State.

C. Confidentiality.

Section E (Confidentiality) is deleted in its entirety.

1) Definitions

As used in this Section, "Confidential Information" means all information of the parties, except information that is:

- (a) mandatorily disclosable under the Texas Public Information Act;
- (b) now available or becomes available to the public without breach of this Contract;
- (c) released in writing by the disclosing party;
- (d) obtained from a third party or parties having no obligation of confidentiality with respect to such information;
- (e) publicly disclosed pursuant to federal or state law; or
- (f) independently developed by the receiving party without reference to Confidential Information of the furnishing party.

(2) Protection and Destruction of Confidential Information

- (a) Each party must use the same care to prevent unauthorized disclosure of Confidential Information as it uses to prevent disclosure of its own information of a similar nature, but in no event less than a reasonable degree of care. Neither the Vendor nor the State will: (i) make any use of the Confidential Information of the other except as contemplated by this Contract; (ii) acquire any interest or license in or assert any lien against the Confidential Information of the other; or (iii) if

requested to do so, refuse for any reason to promptly return the other party's Confidential Information.

- (b) Each party will limit disclosure of the other party's Confidential Information to employees, agents, and Subcontractors who must have access to fulfill the purposes of this Contract. Disclosure to, and use by, a Subcontractor is permissible where: (i) use of a Subcontractor is authorized under this Contract; (ii) the disclosure is necessary or otherwise naturally occurs in connection with work that is within the Subcontractor's scope of responsibility; and (iii) Vendor obligates the Subcontractor in a written contract to maintain the State's Confidential Information in confidence.
- (c) Upon termination of the Contract, Vendor must promptly return the State's Confidential Information or certify to the State that Vendor has destroyed all of the State's Confidential Information.

(3) Exclusions

The provisions of this Section will not apply where the receiving party is required by law to disclose or retain the other party's Confidential Information, provided that the receiving party: (i) promptly provides the furnishing party with notice of the legal request to the extent legally permissible; and (ii) assists the furnishing party in resisting or limiting the scope of the disclosure as reasonably requested by the furnishing party.

(4) No Obligation to Disclose

Nothing contained in this Section will be construed as obligating a party to disclose any particular Confidential Information to the other party.

D. Injunctive Relief.

The Contract is intended to protect Customer's proprietary rights pertaining to the Work Product, and the Intellectual Property Rights therein, and any misuse of such rights would cause substantial and irreparable harm to Customer's business. Therefore, Vendor acknowledges and stipulates that a court of competent jurisdiction may immediately enjoin any material breach of the intellectual property, use, and confidentiality provisions of this Contract, upon a request by Customer, without requiring proof of irreparable injury as same should be presumed.

E. Return of Materials Pertaining to Work Product.

Upon the request of Customer, but in any event upon termination or expiration of this Contract or a Statement of Work, Vendor shall surrender to Customer all documents and things pertaining to the Work Product, including but not limited to drafts, memoranda, notes, records, drawings, manuals, computer software, reports, data, and all other documents or materials (and copies of same) generated or developed by Vendor or furnished by Customer to Vendor, including all materials embodying the Work Product, any Customer confidential information, or Intellectual Property Rights in such Work Product, regardless of whether complete or incomplete. This section

is intended to apply to all Work Product as well as to all documents and things furnished to Vendor by Customer or by anyone else that pertains to the Work Product.

F. Vendor License to Use.

Customer hereby grants to Vendor a non-transferable, non-exclusive, royalty-free, fully paid-up license to use any Work Product solely as necessary to provide the Services to Customer. Except as provided in this Section, neither Vendor nor any Subcontractor shall have the right to use the Work Product in connection with the provision of services to its other customers without the prior written consent of Customer, which consent may be withheld in Customer's sole discretion.

G. Third-Party Underlying and Derivative Works.

Vendor will disclose the use or incorporation of any Third Party IP into the Work Product or Deliverables and a description of the ownership and use rights that will be provided to the Customer. At the time of delivery, the Vendor will provide in writing the name and use of any Third Party IP, including information regarding the Vendor's authorization to include and utilize such Third Party IP. The notice shall include a copy of any ownership agreement or license that authorizes the Vendor to use the Third Party IP. If Vendor procures any Third Party IP for the State, then Vendor must assign or otherwise transfer to the State, or afford the State the benefits of, any license rights, including the manufacturer's warranty, for the Third Party IP.

H. Agreement with Subcontracts.

Vendor agrees that it shall have written agreement(s) that are consistent with the provisions hereof related to Work Product and Intellectual Property Rights with any employees, agents, consultants, contractors or subcontractors providing Services or Work Product pursuant to the Contract, prior to their providing such Services or Work Product, and that it shall maintain such written agreements at all times during performance of this Contract, which are sufficient to support all performance and grants of rights by Vendor. Copies of such agreements shall be provided to the Customer promptly upon request. Vendor may redact confidential information, but in any event must provide copies sufficient to ensure Vendor's compliance with this section.

I. Vendor Development Rights.

To the extent not inconsistent with Customer's rights in the Work Product or as set forth herein, nothing in this Contract shall preclude Vendor from developing for itself, or for others, materials which are competitive with those produced as a result of the Services provided hereunder, provided that no Work Product is utilized, and no Intellectual Property Rights of Customer therein are infringed by such competitive materials.

6. Appendix A. Section 7. Pricing, Purchase Orders, Invoices and Payments, C. Customer Price, is hereby restated:

1) The price to the Customer shall be calculated as follows:

Customer Price = (MSRP or List Price – Customer Discount as set forth in Appendix C, Pricing Index) x (1 + DIR Administrative Fee, as set forth in the Contract).

2) Customers purchasing products and services under this Contract may negotiate more advantageous pricing or participate in special promotional offers. In such event, a copy of such better offerings shall be furnished to DIR upon request.

During the Contract term, if pricing for products, specific product configurations, or services available under this Contract is provided by the Contractor (not Order Fulfillers) at a lower price to: (i) an eligible Texas Customer who is not purchasing those products, specific product configurations, or services under this Contract or (ii) to any other entity or consortia authorized by Texas law to sell said products and services to eligible Texas Customers, under like terms and conditions provided for the State for those commodities and services under this Contract, then the available Customer Price in this Contract shall be adjusted to that lower price. This requirement only applies to products, specific product configurations, or services quoted by Vendor for a quantity of one (1) under like terms and conditions, and does not apply to volume or special pricing (e.g., Big Deal or customizable services) purchases. To the extent that either party identifies and confirms that better pricing is offered by Vendor in accordance with this section, this Contract will be amended to reflect the lower price as of the date when the lower price was offered.

7. **Appendix A. Section 7. Pricing, Purchase Orders, Invoices and Payments, G. Changes to Prices**, is hereby restated:

Vendor may revise its pricing (but not its discount rate, if any, and not the products on its pricing list) by posting a revised pricing list. Such revised pricing lists are subject to review by DIR.

If DIR finds that a product's price has been increased unreasonably, DIR may require Vendor to reduce its pricing for the product to the level published before the revision. Vendor must so reduce its pricing, or remove the product from its pricing list. Failure to do so will constitute an act of default by Vendor.

8. **Appendix A. Section 8. Contract Administration, C. Records and Audits**, is hereby restated:

- 1) Acceptance of funds under the Contract by Vendor acts as acceptance of the authority of the State Auditor's Office, or any successor agency, to conduct an audit or investigation in connection with those funds. Vendor further agrees to cooperate fully with the State Auditor's Office or its successor in the conduct of the audit or investigation, including providing all records requested. Vendor will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through Vendor and the requirement to cooperate is included in any subcontract it awards pertaining to the Contract. Under the direction of the Legislative Audit Committee, a Vendor that is the subject of an audit or investigation by the State Auditor's Office must provide the State Auditor's Office with access to any information the State Auditor's Office considers relevant to the investigation or audit.

- 2) Vendor shall maintain adequate records to establish compliance with the Contract until the later of a period of seven (7) years after termination of the Contract or until full, final and unappealable resolution of all Compliance Check or litigation issues that arise under the Contract. Such records shall include per transaction: Customer name, invoice date, invoice number, description, quantity, unit price, extended price, Customer Purchase Order number, contact name, Customer's complete billing address, the calculations supporting each administrative fee owed DIR under the Contract, Historically Underutilized Businesses Subcontracting reports, and such other documentation as DIR may request.
- 3) Vendor and/or Order Fulfillers shall grant access to all paper and electronic records, books, documents, accounting procedures, practices and any other items relevant to the performance of the Contract to the DIR Internal Audit department or DIR Contract Management staff, including the compliance checks designated by the DIR Internal Audit department, DIR Contract Management staff, the State Auditor's Office, and of the United States, and such other persons or entities designated by DIR for the purposes of inspecting, Compliance Checking and/or copying such books and records. Vendor and/or Order Fulfillers shall provide copies and printouts requested by DIR without charge. DIR shall provide Vendor and/or Order Fulfillers thirty (30) business days' notice prior to inspecting, Compliance Checking, and/or copying Vendor's and/or Order Fulfiller's records. Vendor's and/or Order Fulfillers records, whether paper or electronic, shall be made available during regular office hours. Vendor and/or Order Fulfiller personnel familiar with the Vendor's and/or Order Fulfiller's books and records shall be available to the DIR Internal Audit department, or DIR Contract Management staff and designees as needed. Vendor and/or Order Fulfiller shall provide adequate office space to DIR staff during the performance of Compliance Check. Subject to the Vendor's reasonable objection to the audit determination, if the difference between the Vendor's actual payment and the correct DIR Administrative Fee amount, as determined by an audit, is greater than 3%, then the Vendor must pay all reasonable audit costs within thirty (30) days of receipt.
- 4) For procuring State Agencies whose payments are processed by the Texas Comptroller of Public Accounts, the volume of payments made to Vendor through the Texas Comptroller of Public Accounts and the administrative fee based thereon shall be presumed correct unless Vendor can demonstrate to DIR's satisfaction that Vendor's calculation of DIR's administrative fee is correct.

9. **Appendix A. Section 9. A 2 Acts or Omissions** is hereby replaced in its entirety:

Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL THIRD PARTY LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS FOR PHYSICAL INJURY, DEATH, DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY, OR ASSOCIATED ECONOMIC LOSS AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES arising out of, or resulting from any acts or

omissions of the Vendor or its agents, employees, subcontractors, Order Fulfillers, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

10. **Appendix A. Section 9. Vendor Responsibilities, K. Limitation of Liability**, is hereby replaced in its entirety:

For any claim or cause of action arising under or related to the Contract: i) to the extent permitted by the Constitution and the laws of the State of Texas, none of the parties shall be liable to the other for punitive, special, or consequential damages, even if it is advised of the possibility of such damages; and ii) Vendor's aggregate liability for damages of any kind under the Contract other than for claims for third party patent, trademark or copyright infringement ("IP Claims") shall be limited to the lesser of: (A) thirty-six times the average monthly amount paid to Vendor under the Contract during the twelve months immediately preceding the accrual of the claim or cause of action; or (B) \$20,000,000. Vendor's aggregate liability under the Contract for IP Claims shall not exceed \$15,000,000. CUSTOMERS SHOULD EVALUATE THEIR RISK FOR EACH PURCHASE: IF NEEDED, CUSTOMERS MAY NEGOTIATE HIGHER LIMITATIONS OF LIABILITY.

11. **Appendix A. Section M. Required Insurance Coverage**, is hereby restated:

As a condition of this Contract with DIR, Vendor shall maintain the listed insurance coverage within 5 days of execution of the Contract if the Vendor is awarded services which require that Vendor's employees perform work at any Customer premises and/or use Vendor's vehicles to conduct work on behalf of Customers. In addition, when engaged by a Customer to provide services on Customer premises, the Vendor shall, at its own expense, maintain the insurance coverage specified herein, and shall provide proof of such insurance coverage to the related Customer within five (5) business days following the execution of the Purchase Order. Vendor may not begin performance under the Contract and/or a Purchase Order until such proof of insurance coverage is provided to, and approved by, DIR and the Customer. Required insurance must be issued by companies that are A-VII financially rated by AM BEST and duly licensed, admitted, and authorized to do business in the State of Texas. The Customer and DIR will be included as Additional Insureds under the required General Liability and Auto Liability coverages. Required coverage must remain in effect through the term of the Contract and each Purchase Order issued to Vendor there under. The acceptable insurance provisions are as follows:

- 1) Commercial General Liability

Commercial General Liability must include a limit of \$1,000,000 per occurrence including products/completed operations, where appropriate, with a separate aggregate limit of \$2,000,000. The policy shall contain the following provisions:

- a) Blanket contractual liability coverage for liability assumed under the Contract;
- b) Independent Contractor coverage;
- c) State of Texas, DIR and Customer shall be included as an additional insured (this requirement may be met through the use of a blanket additional insured endorsement); and
- d) Waiver of Transfer Right of Recovery Against Others in favor of DIR and/or Customer (this requirement may be met through the use of a blanket waiver of subrogation endorsement).

2) Workers' Compensation Insurance

WORKERS' COMPENSATION INSURANCE COVERAGE MUST INCLUDE LIMITS CONSISTENT WITH STATUTORY BENEFITS OUTLINED IN THE TEXAS WORKERS' COMPENSATION ACT (ART. 8308-1.01 ET SEQ. TEX. REV. CIV. STAT) AND POLICY LIMITS FOR EMPLOYERS' LIABILITY OF \$1,000,000 BODILY INJURY PER ACCIDENT, \$1,000,000 BODILY INJURY DISEASE POLICY LIMIT AND \$1,000,000 PER DISEASE PER EMPLOYEE.

3) Business Automobile Liability Insurance

Business Automobile Liability Insurance must cover all owned, non-owned and hired vehicles with a combined single limit of \$500,000 per accident for bodily injury and property damage. Alternative acceptable limits are \$250,000 bodily injury per person, \$500,000 bodily injury per accident and \$100,000 property damage liability per accident. The policy shall contain the following endorsements in favor of DIR and/or Customer:

- a) Waiver of Subrogation; and
- b) State of Texas, DIR and Customer shall be included as an Additional Insured.

12. **Appendix A, Standard Terms and Conditions for Services Contracts dated 8/9/13**, is hereby replaced in its entirety with **Appendix A, Standard Terms and Conditions for Services Contracts dated 09/24/15**, as attached.

13. **Appendix C, Pricing Index**, is hereby replaced in its entirety.

All other terms and conditions of the Contract not specifically modified herein shall remain in full force and effect. In the event of a conflict among provisions, the order of precedence shall be this Amendment Number 1 and then Contract DIR-TSO-2735.

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IN WITNESS WHEREOF, the parties hereby execute this Amendment Number 1 to be effective upon the date of the last signature but in all events, not later than December 18, 2015.

HP Enterprise Services, LLC

Authorized By: signature on file

Name: Ernie Sanders

Title: Account Executive

Date: 1/8/15

The State of Texas, acting by and through the Department of Information Resources

Authorized By: signature on file

Name: Dale Richardson

Title: Chief Operations Officer

Date: 1/12/16

Office of General Counsel: DB Brown 1/12/16